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The Pregnancy Penalty

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-SYMPOSIUM-
THE PREGNANCY PENALTY

Michele Goodwin[†]

ABSTRACT

Punishing pregnant women increasingly serves as a litmus test in political discourse, inviting more than a metaphor about state sanctioned violence targeted at women. In 2016, candidates for the United States presidency threatened to defund Planned Parenthood if elected and a leading candidate promised he would “punish” pregnant women who seek abortions. Other presidential candidates urged that even victims of rape and incest should be forced to carry their pregnancies to term, imposing yet another penalty or strike against sexually violated women and girls.

Local legislatures and governors show equal contempt for and desire to penalize women in their states. In Utah, Gov. Gary Herbert took up the call to use a “very strong stick” in policing reproduction by signing into law the Criminal Homicide and Abortion Revisions Act, which applies only to pregnant women. The law seeks to punish pregnant women who “knowingly” commit acts that might result in miscarriages.¹ In 2011, Texas Rep. Doug Miller authored and introduced a bill in his state legislature that would make it a felony to ingest any controlled substance during pregnancy.² Wisconsin’s legislature passed a law that forces pregnant women to receive vaginal probes as a pre-condition to receiving an abortion.³ To obtain an

[†] Chancellor’s Professor of Law, University of California, Irvine. These comments are derived from my keynote lecture at Case Western University School of Law’s symposium, *The Rhetoric of Reproduction* (Apr. 17, 2015), available at http://law.case.edu/Lectures-Events/Webcast/lecture_id/397. The title of this Article derives from a brilliantly coined phrase from Professor Song Richardson, a leading expert on the intersections of race, crime, and the law. This Article advances what the pregnancy penalty entails. I am grateful to the conveners and the Health Matrix student editors. © Michele Goodwin

1. H.B. 462, 2010 Gen. Sess. (Utah 2010).
2. H.B. 1243, 2011 Leg., 82nd Sess. (Tex. 2011).
3. S.B. 206, 2013 Wis. Laws 37 (2013). *See also* Tom Kertscher, *EMILY’S LIST: Scott Walker is Forcing Some Women to Get Transvaginal Ultrasounds to Get an Abortion*, POLITIFACT WISCONSIN (Oct. 24, 2014, 11:40 AM), <http://www.politifact.com/wisconsin/statements/2014/oct/24/emilys-list/scott-walker-forces-some-women-get-transvaginal-ul/> (“Planned Parenthood of Wisconsin told us that only a transvaginal ultrasound would enable a clinician to meet the requirements of the law for early-stage pregnancies, up to 12 weeks. And according to an August 2014 report from the state Department of Health Services, 84 percent of abortions in Wisconsin are performed at 12 weeks or less.”)

abortion without undergoing the vaginal probe is a punishable violation of law. Some women's groups compare vaginal ultrasound laws such as that in Wisconsin to state sanctioned rape with a rod.⁴ Other legislative efforts include establishing personhood in embryos and fetuses.⁵ Many of the laws seeking to punish pregnant women and regulate their pregnancies introduce criminal sanctions into gestational conduct, broadly criminalizing any behavior that could harm fetal health.⁶ All of these laws selectively target pregnant women.

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I. INTRODUCTION

This Article builds from my keynote address at Case Western University School of Law's daring symposium, *The Rhetoric of Reproduction*. It explains how a chilling intensity in legislative rulemaking specifically directed at dismantling women's health protections is sweeping across the United States. By proposing and enacting more anti-reproductive rights legislation than in any time prior in the past forty years combined, legislators demonstrate an intensified disregard for women's health care rights. Laws providing legal protections for pharmacists who refuse to dispense contraceptive medications to women epitomize this rulemaking.

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4. See, e.g., Andy Kopsa, *State-Sanctioned Rape: Trans-Vaginal Ultrasound Laws in Virginia, Texas, and Iowa*, RH REALITY CHECK (Feb. 15, 2012, 3:15 PM), <http://rhrealitycheck.org/article/2012/02/15/government-sanctioned-rape-in-state-virginia-and-texas/>; Nicholas Kristoff, *When States Abuse Women*, N.Y. TIMES (Mar. 3, 2012), <http://www.nytimes.com/2012/03/04/opinion/sunday/kristof-when-states-abuse-women.html>.
 5. See, e.g., Erick Eckholm, *Push for 'Personhood' Amendment Represents New Tack in Abortion Fight*, N.Y. TIMES (Oct. 25, 2011), <http://www.nytimes.com/2011/10/26/us/politics/personhood-amendments-would-ban-nearly-all-abortions.html>.
 6. See, e.g., Erik Eckholm, *Voters in Mississippi to Weigh Amendment on Conception as the Start of Life*, N.Y. TIMES, Oct. 26, 2011, at A16.

However, the stunning range of hostile lawmaking dismantling women's rights includes expanding the authority of Iowa's governor to approve each Medicaid funded abortion in his state.⁷ It extends to targeted restrictions of abortion providers (TRAP laws) in Texas. For example, Texas law now requires abortion providers to obtain admitting privileges at local hospitals and mandates costly clinical upgrades to facilities performing abortions.⁸ Some states force women to undergo medically unnecessary vaginal probes as a precondition of obtaining an abortion and mandate that clinics must provide medically inaccurate information, such as counseling women that abortions cause cancer and long-term mental health consequences as a condition of providing services to their patients.⁹ Nearly a dozen states prohibit private insurance plans from covering abortion services in their states.¹⁰ Such laws not only impose constitutionally impermissible burdens on women, but also private businesses. Finally, most states now require women to wait extended periods before obtaining an abortion,¹¹ under pretext of promoting informed consent. This Article memorializes my comments.

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7. Nora Caplan-Bricker, *Poison Pen*, NEW REPUBLIC (June 5, 2013), <https://newrepublic.com/article/113378/iowa-budget-would-give-governor-power-over-medicaid-abortion-benefits> (discussing Iowa's 2014 budget, which gave the governor "the right to deny Medicaid reimbursements to poor women who've had medically necessary abortions.")
 8. STATE POLICIES IN BRIEF: TARGETED REGULATION OF ABORTION PROVIDERS, GUTTMACHER INST. (Mar. 2016), https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_TRAP.pdf.
 9. STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS, GUTTMACHER INST. (MAR. 2016), https://www.guttmacher.org/sites/default/files/state_policy_overview_files/spib_oal.pdf.
 10. *Id.*
 11. For an overview of legislation escalating restrictions on reproductive rights, see STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS, GUTTMACHER INST. (April 2016), https://www.guttmacher.org/sites/default/files/state_policy_overview_files/spib_oal.pdf; 2015 STATE OF THE STATES: FIGHTING BACK BY PUSHING FORWARD, CENTER FOR REPRODUCTIVE RIGHTS (2015), <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPS-Year-End-Report-Vs-6.pdf>; Joerg Dreweke, *Contraception Is Not Abortion: The Strategic Campaign of Antiabortion Groups To Persuade The Public Otherwise*, 17 Guttmacher Policy Review 4 (2014) <https://www.guttmacher.org/sites/default/files/pdfs/pubs/gpr/17/4/gpr170414.pdf>; Marcia Angell & Michael Greene, Opinion, *Where are the Doctors?*, USA TODAY (May 15, 2012, 6:36 PM), <http://www.usatoday.com/news/opinion/forum/story/2012-05-15/women-contraception-abortion-reproductive-rights-doctors/54979766/1>. See also *2011 Ballot Measures: Election Results*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 9, 2011,

The legislative process now serves as a powerful tool to dismantle women's healthcare rights, while elevating the legal stature of embryos and fetuses. Referenda and petitions to redefine personhood in Colorado, Georgia, Montana, Kansas, Alabama, Virginia, Ohio, and Florida further highlight the concerns of this Article. What accounts for these trends and political hostility toward women's reproductive health access, autonomy, and equality in the U.S.? Legislators justify encroachments on women's reproductive liberty, claiming that their lawmaking protects women's health and promotes safety. They falsely maintain that TRAP and fetal protection laws actually safeguard women's health. For example, legislators argue that mandated wait periods *advance* women's informed consent by providing them more information and time to evaluate their constitutional choices. TRAP law advocates promote similar claims; they contend that these laws fit within permissive constitutional limits and do not violate the *undue burden* framework established by the U.S. Supreme Court in *Planned Parenthood v. Casey*,¹² which permits states to regulate abortion so long as the legislation does not unduly burden the interests of pregnant women.

Despite claims that the spate of legislative rulemaking targeting women's reproductive health serves to protect the interests of girls and women; in reality those rationales directly conflict with empirical science and medical evidence. That is, the safety claims purported by politicians are specious at best, because legal abortions are dramatically and unequivocally safer than pregnancy and childbirth.¹³ Further, no scientific evidence links abortions to cancer or long-term mental illness or incapacity.¹⁴

Instead, contemporary legislation that impose burdens on pregnant women exposes intolerance on the part of lawmakers and

7:45 AM), <http://www.ncsl.org/legislatures-elections/elections/ballot-measure-election-results.aspx>; *Voters in the GA GOP Primary Will Vote on Personhood*, CHRISTIAN NEWswire (May 21, 2012), <http://www.christiannewswire.com/news/7053319758.html>; *Personhood Initiative Pursued in Montana*, MS. MAGAZINE (June 7, 2012), <http://www.msmagazine.com/news/uswirestory.asp?id=13698>; Julie Rovner, *Abortion Foes Push to Redefine Personhood*, NPR (June 1, 2011), <http://www.npr.org/2011/06/01/136850622/abortion-foes-push-to-redefine-personhood>.

12. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
13. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 217 (2012).
14. See, e.g., *Reproductive History and Breast Cancer Risk*, NAT'L CANCER INST., <http://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/reproductive-history-fact-sheet#q4>; Susan A. Cohen, *Still True: Abortion Does Not Increase Women's Risk of Mental Health Problems*, 16 GUTTMACHER POL'Y REV. 13 (2013).

contempt for women's discernment, health, and legal rights.¹⁵ For example, women are far more likely to die by carrying a pregnancy to term than obtaining a legal abortion. In fact, women are fourteen times more likely to die during pregnancy than by receiving a legal abortion.¹⁶

The death rate for an abortion is less than 1 per 100,000,¹⁷ compared to 1 in 57,000 for outpatient plastic surgery.¹⁸ According to World Health Organization data, a legal abortion is as safe as a penicillin shot.¹⁹ In other words, protectionist rulemaking under the guise of bettering women's health by prolonging their pregnancies and delaying their ability to terminate a pregnancy actually increases medical risks and health harms, including potential death. Given this medical evidence, the attacks on reproductive health show a profound disregard for women's lives as seen across the U.S.

This Article proceeds in three parts. Part II examines this new wave of reproductive policing. It explains that for all the first wave feminist scholarly approaches to concerns about women's lives, the intersections of sex, regulation, and criminalization were virtually ignored. Part III analyzes the thrust of recent statutory provisions targeting pregnant women. It argues that criminal regulation of pregnancy relies on faulty stereotypes and suspect moral norms that serve as proxies for fear and discrimination. Part IV connects the new reproductive policing to the nativism that inspired and cemented U.S. eugenic policies. Part V concludes.

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15. See Tracy Weitz and Katrina Kimport, *The Discursive Production of Abortion Stigma In The Texas Ultrasound Viewing Law*, 30 BERKELEY J. GENDER L. & JUST. 6 (2015); Lynn Paltrow and Jeanne Flavin, *The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLITICS, POLICY & LAW 299 (2013). See also, Dorothy E. Roberts, *Racism and Patriarchy In The Meaning of Motherhood*, 1 J. GENDER & LAW 1 (1993).
 16. Raymond & Grimes, *supra* note 13.
 17. Suzanne Zane et al., *Abortion-Related Mortality in the United States: 1998-2010*, 126 OBSTETRICS & GYNECOLOGY 258 (2015).
 18. *Guide to Safe Plastic Surgery: Patient Safety*, AM. SOC'Y OF PLASTIC SURGEONS, <http://www.plasticsurgery.org/patient-safety/patient-and-consumer-information/patient-safety.html?sub=Accredited+facilities>.
 19. WHO, CLINICAL PRACTICE HANDBOOK FOR SAFE ABORTION 14 (2008).

II. THE NEW WAVE OF REPRODUCTIVE POLICING

For all the first wave feminist legal theory attention to constitutional doctrine and legal theory related to pornography,²⁰ work,²¹ capacity,²² assisted reproduction,²³ literature,²⁴ domestic labor,²⁵ and marriage,²⁶ much less scholarship explored the early

20. *Compare* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1980) (discussing the damaging effects of pornography on women and society), and Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 1 (1985) (defining “pornography as a civil rights violation”), with ALAN SOBLE, PORNOGRAPHY, SEX, AND FEMINISM (2002) (defending pornography, suggesting that MacKinnon’s and Dworkin’s views as paternalistic and flawed), and Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1566 (1988) (“[T]he anti-porn forces have fundamentally misconstrued the nature of pornography, and . . . only by accepting their cropped view of communication and ideas can their repressive goals be justified.”).
21. For various examples of arguments for equal pay and gender equality, see Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 131, 132-33 (Judy Fudge & Rosemary Owens eds., 2006); Vicky Lovell, *Evaluating Policy Solutions to Sex-Based Pay Discrimination: Women Workers, Lawmakers, and Cultural Change*, 9 U. MO. L.J. RELIGION, GENDER, & CLASS 45 (2009).
22. See MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 4 (2000); Amrita Basu, *Who Secures Women’s Capabilities in Martha Nussbaum’s Quest for Social Justice?*, 19 COLUM. J. GENDER & L. 201 (2010); Martha Nussbaum, *Women and Equality: The Capabilities Approach*, 138 INT’L LAB. REV. 227, 230 (1999); Saskia Sassen, *Strategic Gendering as Capability: One Lens into the Complexity of Powerlessness*, 19 COLUM. J. GENDER & L. 179 (2010).
23. See June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 19 (2010); Judith Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 21 (2008); Kimberly M. Mutcherson, *Making Mommies: Law, Pre-Implantation Genetic Diagnosis, and the Complications of Pre-Motherhood*, 18 COLUM. J. GENDER & L. 313, 315 (2008).
24. See Anita L. Allen, *The Jurisprudence of Jane Eyre*, 15 HARV. WOMEN’S L.J. 173 (1992); Linda R. Hirshman, *Sex, Money, and Classical Philosophy: A Comment on Anita Allen’s “The Jurisprudence of Jane Eyre,”* 15 HARV. WOMEN’S L.J. 239 (1992); Margaret Valentine Turano, *Jane Austen, Charlotte Bronte, and the Marital Property Law*, 21 HARV. WOMEN’S L.J. 179 (1998).
25. See Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 835, 842 (2002); Vicki Szshultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1883, 1900 (2000).
26. See Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123 (2009); Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic*

emergence of this new wave of hostility toward women's reproductive rights. The exceptions included the profound and landmark work of Professor Dorothy Roberts and the activist leadership of Byllye Avery, Loretta Ross, and Lynn Paltrow.

However, the opportunity and urgency exists to connect this modern maternal policing (fetal protection laws) to the old reproductive policing (eugenics), now revisited by legislatures in Georgia,²⁷ California,²⁸ and North Carolina²⁹ in their attempts to account for thousands of forced-sterilizations carried out in their states in the name of promoting racial purity and intellectual "fitness." Feminist jurisprudence urgently needs a robust narrative account that bridges the gap between sex, race, and status to illustrate a more dynamic and accurate story of fetal protection law implementation and state violence against pregnant women. Indeed, states increasingly rely on non-legal actors, particularly nurses and doctors, to implement fetal protection laws, which leads to judgment calls that color who becomes the subject of maternal policing and who is exempted. A random but telling sampling of recent cases illustrates this latter point.

In Alabama, a local district attorney petitioned to terminate an incarcerated woman's parental rights. In that case, Jane Doe wanted an abortion. By terminating her parental rights, prosecutors explained that "[she] would not have standing to obtain the abortion."³⁰ One reporter commented, "Alabama has brought efforts to restrict abortion to a whole new level."³¹ Indeed, the state appointed a lawyer for Doe's fetus. However, Alabama is one among a

State's Regulation of Intimate Relationships Between Adults, 30 HARV. J. L. & GENDER 25, 33 (2007); Mark Strasser, *The Future of Marriage*, 21 J. AM. ACAD. MATRIM. L. 87 (2008).

27. See Bo Emerson, *Compensation for State-Enforced Sterilization: Money Won't Be Enough*, ATLANTA J. CONST. (Jan. 23, 2012, 5:34 AM), <http://www.ajc.com/news/news/state-regional-govt-politics/compensation-for-state-enforced-sterilization-mone/nQQb6/>.
28. See Elizabeth Cohen & John Bonifeld, *California's Dark Legacy of Forced Sterilizations*, CNN (Mar. 15, 2012, 1:38 PM), <http://www.cnn.com/2012/03/15/health/california-forced-sterilizations/index.html>.
29. See Kim Severson, *Thousands Sterilized, a State Weighs Restitution*, N.Y. TIMES (Dec. 19, 2011), http://www.nytimes.com/2011/12/10/us/redress-weighed-for-forced-sterilizations-in-north-carolina.html?pagewanted=all&_r=0.
30. Jessica Valenti, *The Latest Anti-Choice Move: Try To Take Custody of a Woman's Fetus*, THE GUARDIAN (July 31, 2015), <http://www.theguardian.com/commentisfree/2015/jul/31/the-latest-anti-abortion-move-alabama-custody-fetus>.
31. *Id.*

number of states aggressively infringing on established reproductive rights. In some of these cases, states appoint attorneys for fetuses, but not the pregnant women.

In 2015, Purvi Patel was arrested and charged in the murder of her dead fetus.³² In that case, Patel sought emergency medical help while still bleeding. She told doctors she had miscarried and placed the fetal remains in the refuse bin. Prosecutors argued that the death of the fetus was not a miscarriage, but rather both neglect and intentional feticide. They claimed she had researched abortion methods, including seeking out prescription medications to terminate her pregnancy. Despite the fact that the state's toxicologist could not find any evidence that Ms. Patel used abortifacients and evidence that the fetus would not have survived, prosecutors refused to yield.

On March 30, 2015, Patel received a 30-year prison term after conviction on both charges. A judge later reduced the sentence to 20 years.³³ Sadly, Patel's case is not alone. Pregnant women are threatened with civil confinement based on "neglect of fetuses," and even child abuse of their fetuses.

Similarly, in January 2013, Maria Guerra became another victim of pregnancy profiling.³⁴ In that case, Memphis police officers arrested Ms. Guerra, a four-month pregnant woman for *child endangerment* and "driving under the influence" (DUI), both very serious charges and allegations.³⁵ However, Ms. Guerra was not legally intoxicated, because she did not meet the Tennessee legal standard for intoxication, which is applied to all other Tennessee drivers.³⁶ Indeed, she tested at about half the legal limit established for intoxication in that state.³⁷ Neither was Ms. Guerra driving with a child in her car. Other than herself, the car was empty.

What prompted Guerra's arrest? Police alleged that because she was four months pregnant, her fetus qualified as a legal person, and therefore a victim of her driving. Ironically, Ms. Guerra had not been in an accident, nor was she or her fetus harmed. These types of

32. Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES MAG. (April 1, 2015), <http://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html>.

33. Jennifer Chowdhury, *Indiana Sentences Purvi Patel to 20 Years for Feticide*, NBC NEWS (Mar. 31, 2015), <http://www.nbcnews.com/news/asian-america/indiana-has-now-charged-two-asian-american-women-feticide-n332761>.

34. Kontji Anthony, *Police: Woman Earns DUI for Endangering Fetus*, WMCTV (Jan. 7, 2013, 8:07 PM), <http://www.wmctv.com/story/20525700/police-pregnant-woman-earns-dui-for-endangering-fetus>.

35. *Id.*

36. *Id.*

37. *Id.*

arrests go unnoticed within the broader frame of feminist jurisprudence and women's advocacy organizations.³⁸ However, they matter to the broader discourse about women's equality, which must take these types of cases into account, in particular because these cases often involve more than sex, but also race and class. Was Ms. Guerra the victim of racial profiling—stopped precisely because of her status as a Latina—much in the terrifying way that Sandra Bland was profiled and arrested under the pretext of failing to signal a lane change? In reality, such police stops are driven by darker, more harassing motivations.

Whatever the case, such legal interventions and prosecutions raise the question whether a different constitutional standard applies to women or pregnant women. And if so, can a different constitutional standard be justified? Selective prosecutions buttressed by capricious law enforcement ultimately hold pregnant women to a different legal standard than non-gestating women and men. It places any woman of reproductive age at risk of state harassment and violence if she becomes pregnant. If this observation is correct, the urgent need for legal scholars and human rights organizations to address the *pregnancy penalty*³⁹ cannot be overstated.

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38. More astonishing cases have involved denying a cancer patient life-saving chemotherapy treatments because she was pregnant or forcibly incarcerating women for bed rest. *See, e.g.,* Jodi Jacobson, *Pregnant Nicaraguan Woman Denied Treatment for Metastatic Cancer*, RH REALITY CHECK (Feb. 20, 2010, 9:20 AM), <http://rhrealitycheck.org/article/2010/02/20/pregnant-nicaraguan-woman-denied-treatment-metastatic-cancer/>; *People v. Stewart*, No. M508197, Reporter's Transcript, at 4 (Cal. Mun. Ct. San Diego Cty. Feb. 26, 1987) (pregnant woman charged under a criminal child support statute for failing to follow doctor's advice to get bed rest, to abstain from sexual intercourse, and to seek prompt medical attention when she experienced bleeding).
 39. Professor Song Richardson originally coined the term, "pregnancy penalty" to describe the ways in which pregnancy now encounters a new set of legal burdens for women. For work that explores the penalties associated with pregnancy, *see* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CAL. L. REV. 781, 786 (2014) (arguing that "legislative fetal protection efforts are on the rise, driving the creation, enactment, and enforcement of statutes authorizing criminal intervention in women's pregnancies" and noting that "these statutes dramatically exceed prior limits, extending beyond penalizing poor African American pregnant women."); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 300 (2013) (highlighting over 400 instances in which pregnant women have been detained, arrested, and jailed); Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1680–82 (2008) (analyzing the rise in criminal punishment of pregnant women of color); April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for*

In Florida, Jennifer Goodall of Coral Gables encountered threats by her medical providers' business office when she resisted receiving a cesarean section.⁴⁰ In a letter from the head of finance for Bayfront Health Port Charlotte, executives warned Ms. Goodall that the providers would report her to the Department of Children and Family Services for seeking to have a vaginal delivery and threatened to perform the cesarean section "with or without [her] consent."⁴¹ Bureaucratizing pregnancy for the benefit of finance offices exposes another level of penalty for pregnancies. Moreover, it also shows disdain for women's autonomy and health.

That criminal sanction serves as an obvious and permissible tool—for even tedious pencil-pushing bureaucrats—to wield against pregnant women should cause alarm. Economic efficiency protocols that rely on infringing women's health and liberty are irresponsible at best and in the extreme can be deadly. Nevertheless, threats to file abuse charges and engage law enforcement against pregnant women in the U.S. who refuse cesarean-sections have escalated, despite rigorous data that exposes the risks of such procedures.⁴² However, these threats carry real meaning for women who fear arrest, detention, and the financial costs associated with hiring lawyers. Sadly, too many women must defend the right to give birth without the cleaving of their wombs.

On the other hand, some women must fight to avoid civil confinement, including solitary detention, for the supposed protection of their fetuses. In Wisconsin, the state placed Tamara Loertscher in solitary confinement purportedly for the protection of her fetus (a year after incarcerating Alicia Beltran for more than 70 days for similar reasons).⁴³ The state provided Loertscher's fetus legal counsel,

the Benefit of Fetal Health, 16 COLUM. J. GENDER & L. 147 (2007); and Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

40. Jodi Jacobson, *Florida Hospital Demands Woman Undergo Forced C-Section*, RH REALITY CHECK (July 25, 2014, 5:04 PM), <http://rhrealitycheck.org/article/2014/07/25/florida-hospital-demands-woman-undergo-forced-c-section/>.

41. *Id.*

42. *Id.*

43. Bruce Vielmetti, *Pregnant Woman Challenging Wisconsin Protective Custody Law*, MILWAUKEE J. SENTINEL (Jan 2, 2015), <http://www.jsonline.com/news/wisconsin/pregnant-woman-challenging-wisconsin-protective-custody-law-b99411705z1-287395241.html>. For a discussion on Alicia Beltran's case, see Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES, Oct. 24, 2013, at A1.

while twice denying her similar access.⁴⁴ Such state actions not only trample fundamental constitutional rights, they reveal hostility toward and actually undermine fetal health.

For example, Wisconsin authorities denied Loertscher prenatal care while she was in solitary confinement. It is hard to reconcile how placing a pregnant woman in solitary confinement without access to prenatal care actually benefits the gestating fetus. Rather, such state actions cruelly punish women for failure to adhere to random and arbitrary commands and standards such as *don't have miscarriages* and *avoid any and all potential harms to your pregnancy*. Ultimately, Wisconsin failed to demonstrate any sincere care toward Loertscher's fetus.

These problematic cases account for only a slice of the ways in which the states either police women's reproductive rights or permit private actors to do so, by allowing pharmacists to refuse to dispense contraceptives⁴⁵ or doctors to deny gay couples reproductive technology services.⁴⁶ Modern fetal protection efforts introduce new standards that affect not only the interpretations of the legal status of fetuses for purposes of child protection, but also for criminal prosecution.⁴⁷

In recent years, legislatures increasingly employ language that assigns "legal rights to fetuses 'at any gestational age.'"⁴⁸ Yet, without training in constitutional law, medical personnel may not understand competing legal interests or the primacy of pregnant women's rights to privacy and bodily integrity. Consider Arizona's feticide law, where "the 'unborn child in the womb at any stage of its

44. Victoria Law, *Your Pregnancy may Subject you to Even More Law Enforcement Violence*, TRUTHOUT (Apr. 23, 2015), <http://www.truthout.org/news/item/30363-your-pregnancy-may-subject-you-to-even-more-law-enforcement-violence>.

45. GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (2015), http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf.

46. See, e.g., Susan B. Apel, *Access Denied: Assisted Reproductive Technology Services and the Resurrection of Hill-Burton*, 35 WM. MITCHELL L. REV. 411, 413-14 (2009).

47. Under fetal protection laws, if interpreted broadly, "a woman could be subject to criminal penalties for failure to provide adequate water, nourishment, or a healthy environment to a developing fetus or for attempting to save her life at a risk to the fetus." Michele Goodwin, *Prosecuting The Womb*, GEO. WASH. L. REV. 1657, 1684 (2008).

48. Christine Vestal & Elizabeth Wilkerson, *States Expand Fetal Homicide Laws*, STATELINE, Aug. 22, 2006, http://www.alternet.org/story/40676/states_expand_fetal_homicide_1aws.

development' is fully covered by the state's murder and manslaughter statutes."⁴⁹

For example, in Arizona, "a victim who is 'an unborn child shall be treated like a minor who is under twelve years of age.'"⁵⁰ Virtually any action committed by a woman during pregnancy that results in a miscarriage or still birth could, under this statute, be actionable. At the least, it exposes women to the threat of prosecution. Consider the untenable standard to which Arizona (intentionally or not) now subjects pregnant women, particularly as miscarriages and stillbirths occur for many different reasons from environmental factors to stress. In other words, if broadly applied, pregnant women could potentially be prosecuted for refusing bed rest, ignoring doctor's orders to stop work, and opting out of cesarean surgeries.⁵¹

That states incur a duty to protect the health and safety of its citizens, including the unborn, provides a weak and unsatisfying defense of these laws.⁵² Equally uninspiring are the moral justifications on which these prosecutions rest, because those arguments are selectively deployed.⁵³ As a normative matter, fetal protection laws

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49. ARIZ. REV. STAT. § 13-1104 (2009), as described in NAT'L RIGHT TO LIFE COMM., STATE HOMICIDE LAWS THAT RECOGNIZE UNBORN VICTIMS (May 24, 2013), http://www.nrlc.org/archive/Unborn_Victims/Statehomicidelaws092302.html.
 50. ARIZ. REV. STAT. § 13-705(N), as described in NAT'L RIGHT TO LIFE COMM., *supra* note 49.
 51. See, e.g., Richard L. Berkowitz, *Should Refusal to Undergo a Cesarean Delivery Be a Criminal Offense?*, 104 OBSTET. GYNECOL. 1220, 1220 (2004).
 52. Prior scholarship illuminates the selective deployment of *parens patriae* interest in protecting fetuses. Assisted reproduction, an unregulated set of "family creation," tools provides a provocative counterpoint. Despite startling outcomes: 65% of the procedures fail; fetal crowding often results, contributing to low birth weight infants, miscarriages and still births, cerebral palsy, and higher incidences of cognitive delays, hearing impairment and chromosomal abnormalities in infants, legislators turn a blind eye Michele Goodwin, *A View From The Cradle: Tort Law and The Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1040, 1073 (2010) [hereinafter *View From the Cradle*].
 53. See, e.g., Connie Cho, *Regulating Assisted Reproductive Technology*, VII YALE MED. & L. (Oct. 20, 2010), <http://www.yalemedlaw.com/2010/10/regulating-assisted-reproductive-technology/> (noting the lack of regulation and that it can "lead to medical irresponsibility, even jeopardizing maternal health). Neither current legislation nor law enforcement reconciles the disparate prosecutorial and legislative interests in "policing" some pregnant women and not others. To date, neither federal nor state laws regulate this often-used, but medically risky form of reproduction. Examination of this important legal contradiction has not been taken up in legal scholarship, nor given consideration in judicial jurisprudence or legislative interpretation. This Article fills that gap.

promote externalities that we should be concerned about. Not only are the statutory provisions inconsistently and disparately enforced by sex, class, and race, but they significantly factor into problematic externalities: clandestine, nonconsensual drug-screening of infants; coercive police interrogation of pregnant women; and the selective prosecution of pregnant women. Above all, this law and others like it, raise questions about the constitutionality of the tools deployed to enforce the statutes.

III. LEGISLATING DECENCY AND MORALITY: WHY FETAL PROTECTION LAWS FOCUS ALMOST EXCLUSIVELY ON WOMEN?

Why do recent statutory provisions to protect fetal health focus almost exclusively on criminal punishment of pregnant women? States that criminally pursue pregnant women for drug use during pregnancy rarely target the purveyors—be they pill mill drug providers or street level dealers.⁵⁴ Instead, the fetal protection movement exemplifies “the manifold ways” that morality influences the rule of law, determining its course, implementation, enforcement, and entrenchment.

In other words, statutory efforts to protect fetal health derive from purported moral commitments and status biases, rather than pure public health concerns. This helps to explain selective enforcement of fetal protection laws: why pregnant women who engage in similar conduct are nonetheless disparately targeted by legislators, law enforcement, and courts. The disparate treatment of poor women who turn to illicit drugs during their pregnancies versus wealthy, educated prescription drug users serves as one key example of this double standard.

That is, wealthier, educated, white pregnant women are viewed through a different lens of decency and morality than their poorer counterparts. Pregnant women prescribed narcotic medications to ease their back pain, migraines, stress, depression, and anxiety are not viewed as indecent, flawed, risky, untrustworthy, irresponsible, or

54. Cf. Doretta Massardo McGinnis, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PENN. L. REV. 505, 529 (1990) (“It may be increasingly difficult to maintain respect for a system that prosecutes drug-addicted mothers, arguably the victims of profit-seeking drug dealers, while the dealers are perceived as ‘going free.’”). See also, Allen A. Mitchell et al., *Medication Use During Pregnancy, with Particular Focus on Prescription Drugs: 1976-2008*, AM. J. OBSTETRICS GYNECOLOGY (2011)(finding that educated, white women are more likely to be prescribed and take prescription medications during pregnancy generally, and use more prescription medications during pregnancy as they aged, particularly drugs like Demerol, Tylenol with codeine, Xanax, Oxycontin, and Ritalin).

criminal when they seek to ease their pain. Using prescribed narcotics during pregnancies is a “morally neutral” or even “morally appropriate” activity to further the health and safety of the pregnancy.

Thus, the criminal regulation of pregnancy relies on faulty moral norms and justifications. Fetal protection laws are not unique in this regard; other examples of moral legislation can be traced over time: criminal prohibitions against interracial marriage, homosexual intimacy, interracial intimacy, alcohol consumption, adultery, pornography, and gambling to name but a few.⁵⁵ Legislators who propose fetal protection laws frame these efforts as expressing moral value. In the context of protecting future offspring, such arguments can be persuasive and politically powerful. What politician would dare to oppose or argue against legislation cleverly framed as benefiting babies even when the law achieves no such thing?

As the punishment of pregnant women who seek abortions or refuse bed rest and cesarean sections demonstrates, moral value can be selectively deployed, subjective, and coercive. Moralism legislation related to public health and safety further underscores the point. Segregated swimming pools that banned African Americans from swimming with whites were rooted in the moral urgency to protect whites from the supposed harmful water that touched blacks.⁵⁶ State prohibitions on oral sex supposedly protected the morality of citizens from the “harmful” private behavior of gays.⁵⁷ Segregated water fountains, restricting all “colored” persons from drinking at spigots reserved for whites, ostensibly spared whites from the physical and associational contamination of blacks.⁵⁸ Regulations criminalizing

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55. See generally Debra Thompson, *Racial Ideas and Gendered Intimacies: The Regulation of Interracial Relationships in North America*, 18 SOC. & LEGAL STUD. 353 (discussing the criminalization of interracial intimacy); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (Hardwick held that a sodomy law was valid because laws are often based upon moral judgments that are sufficient to withstand due process analysis); Jeremy Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 195 (1986); CARMEN M. CUSACK, *PORNOGRAPHY AND THE CRIMINAL JUSTICE SYSTEM* 1-9 (2015); Roger Dunstan, *History of Gambling in the United States, in GAMBLING IN CALIFORNIA* (1997), <https://www.library.ca.gov/CRB/97/03/crb97003.html>.
 56. See generally Rachel Martin, *Racial History of American Swimming Pools*, NPR (May 6, 2008), <http://www.npr.org/templates/story/story.php?storyId=90213675>.
 57. See generally Richard Weinmeyer, *The Decriminalization of Sodomy in the United States*, 16 AMA J. ETHICS 916 (2014), <http://journalofethics.ama-assn.org/2014/11/hlaw1-1411.html>.
 58. See generally Jim Crow Laws and Racial Segregation, THE SOCIAL WELFARE HISTORY PROJECT (2011),

spitting on streets, suicide, euthanasia, and physician assisted suicide all root in policing morality.⁵⁹

In fact, a broad spectrum of accommodation restrictions deploy as public health measures with moral and sometimes religious justifications too. In reality, these laws served as proxies for promoting and preserving Jim Crow norms and traditions just as anti-gay ordinances and legislation served similar purpose just a decade ago and are being revitalized now with a new anti-gay legislative fervor. Fetal protection laws, however, are an alarming, under-explored contemporary example of moral legislation.

Fifty years ago, in his magnum opus, *Law, Liberty, and Morality*,⁶⁰ H.L.A. Hart critiqued a vast array of decency standards. He pointed out the bias of such laws. As Hart explained, laws that form the basis for criminal punishment frequently rely on problematic motivations and proxies, such as a collective moral ethic or at least are framed as such. Claiming that a law is rooted in morality deflects criticism and critique. In fact, framing law in religious or moral terms serves to silence rather than enhance debate, because opponents must be cautious in articulating alternative theories for the enactment of moralist legislation.

Indeed, moralist claims assume a hierarchical standing in legal debate. That is precisely why Hart believed such justifications for law were dangerous, because moralist laws and those who propose them were assumed to be immune from bias, ignorance, and blindness.⁶¹ Hart warned that society should be suspicious about the moral cover spread on the bed of indecency standards, because, among other things, majoritarian bias can be corrupt.⁶²

Historically, proponents of fetal protection laws or maternal regulation⁶³ point to moral justifications of criminal punishment and state encroachments, such as compelled, non-consensual sterilization,

<http://www.socialwelfarehistory.com/eras/slavery-civil-rights/jim-crow-laws-andracial-segregation/>.

59. See *Washington v. Glucksberg*, 521 U.S. 702, at 711-12, 719, 730 (1997) (explaining the history of viewing suicide, euthanasia, and physician assisted suicide as immoral); See also Patrick J. O'Connor, *Spitting Positively Forbidden: The Anti-Spitting Campaign, 1896-1910*, SCHOLAR WORKS: UNIVERSITY OF MONTANA (2015), <http://scholarworks.umt.edu/cgi/viewcontent.cgi?article=5498&context=etd> (noting that original anti-spitting statutes were justified by claims of health and safety).
60. H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).
61. See generally *id.*
62. *Id.* at 70.
63. In this Article, “maternity” or “maternal” conduct refers to pregnant women’s behaviors or actions. It does not take up the conduct of women who are mothers, though certainly these categories may overlap.

and court-sanctioned medical or psychiatric incarceration. Sometimes those concerns were wedded with utilitarian, social welfare interests. For example, Justice Oliver Wendell Holmes famously extolled:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.⁶⁴

In recent years, legislators and prosecutors deploy similarly potent moral and social welfare arguments, including saving “our babies,” to justify criminal prosecution of pregnant women. In Utah, for example, Gov. Gary Herbert recently signed into law the Criminal Homicide and Abortion Revisions Act,⁶⁵ which specifically applies to miscarriages and other fetal harms that result from “knowing acts” committed by women.⁶⁶ A prior version of the bill drafted by state legislator Carl Wimmer authorized life imprisonment for pregnant women who engage in reckless behavior during pregnancy that could result in miscarriage and stillbirth.⁶⁷ Even where such laws do not exist, prosecutors and courts act on moral urgency to override pregnant women’s constitutional interests.⁶⁸

Moral arguments suggest that context does not matter. Moral arguments root in the expression that it is impractical and unfeasible to disentangle actions that harm *only* the pregnant woman. Thus, the line countenanced by Hart and John Stuart Mill, that “the only purpose for which power can rightfully be exercised over any member of a civilized community against [her] will is to prevent harms to others,” is situated by fetal protection proponents as consistent with

64. Buck v. Bell, 274 U.S. 200, 207 (1927).

65. UTAH CODE ANN. § 76-5-201(4) (2010).

66. *Id.* See Rose Aguilar, *Utah Governor Signs Controversial Law Charging Women and Girls with Murder for Miscarriages*, ALTERNET (Mar. 9, 2010), http://www.alternet.org/rights/145956/utah_governor_signs_controversial_law_charging_women_and_girls_with_murder_for_miscarriages.

67. *Id.*

68. A trial court in Florida compelled a pregnant mother of two children to bed rest against her will, reasoning that “as between parent and child, the ultimate welfare of the child is the controlling factor...” and as such “override[s] Ms. Burton’s privacy interests at this time.” In that case, the court would not allow the woman to return home to care for her children, but forced her to stay at the hospital. *Burton v. Florida*, 49 So.3d 263, 265 (Fla. Dist. Ct. App. 2010).

their aims, because fetuses have taken on the status of persons with special legal rights.⁶⁹ Even if a distinction in conduct (harm to self versus harm to others) makes sense, legislators and prosecutors claim there are social and health reasons to compel moral conduct even when the behaviors of pregnant women do not harm others.

Ultimately, fetal protection laws fall short of protecting fetal health. Instead, such laws selectively and unconstitutionally burden the interests of pregnant women.⁷⁰ To carry out the mandate of these laws, states subvert their purported moral and legislative interests in promoting fetal health by “chilling” proactive maternal prenatal care as clinics and hospitals (under legislative pressure) cooperate and disclose pregnant patients’ health status, prenatal habits, and conduct to law authorities.⁷¹ This type of pregnancy penalty invites moral and legal scrutiny because the enforcement norms are neither constitutionally neutral nor non-discriminatory.⁷²

IV. WHO OWNS THE WOMB?

Concerns over reproductive autonomy and decision-making in the U.S. dates back to the antebellum period and enslavement of Blacks on American soil. As Professor Dorothy Roberts explains across a series of articles and books, Black women’s status as slave chattel necessarily generated ownership interests on the part of the men and women who owned them.⁷³ This property interest necessarily presumed that slave owners not only owned the labor of slaves but also their reproduction and reproductive potential. This interest was largely property related as the children borne from enslaved women

69. JOHN STUART MILL, ON LIBERTY 14 (1859). *See also* HART, *supra* note 60, at 5. Hart explains that “I myself think there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others,” but agrees with Mill on the “narrower issue relevant to the enforcement of morality.” *Id.* at 5. Here Hart reminds us that “Mill seems to me to be right.” *Id.*

70. *See generally* CENT. FOR REPRODUCTIVE RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN’S HEALTH AND CHILDREN’S INTERESTS (2000), http://www.reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf.

71. *See* Charles Condon, *Clinton’s Cocaine Babies: Why Won’t the Administration Let Us Save Our Children*, 72 POL’Y REV. 12 (1995); Dwight L. Greene, *Foreword: Drug Decriminalization: A Chorus in Need of Masterrap’s Voice*, 18 HOFSTRA L. REV. 457, 466–67 (1990).

72. *See* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 160-62 (2007).

73. DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1997).

became property of the white men who raped them. Viewed through this lens, Black women's reproduction has been policed, censured, owned, and regulated for centuries.

Interests in Black women's reproduction proliferated during the antebellum period, as Roberts explains, whether to thwart infanticide, to maximize profits through forced breeding,⁷⁴ or harness the economics of childrearing,⁷⁵ which included balancing the interests in women's labor and also child bearing.⁷⁶ Arguably, for Black women, the prurient policing of their reproduction shifted from the private spaces of slavery to the public theatre of the state—away from private ownership to harsh legislating by the state. However, the story of policing reproduction and penalizing pregnancy extends beyond Black women.

Contemporary, legislative interests in women's reproduction date back at least one century, to the modern eugenics movement, which originally targeted poor white women in the U.S. Indeed, although eugenics is often remembered as the German platform that resulted in the massacring of millions, euphemistically known as "The Final Solution" its early origins were U.S. based. American roots in eugenics spread deeply and widely throughout the first half of the twentieth century and continued well into the 1970s under the guise of moralist health care platforms.⁷⁷ Some scholars underestimate the scope of the eugenics movement, narrowly framing it as a campaign against only American Black women, forgetting that it targeted poor, illiterate whites—even children--throughout the U.S.⁷⁸

Eugenics is a powerful example of a turn to reproductive property. If the reproductive liberties (or lack thereof) of enslaved women can be characterized in terms of others' property interests, eugenics involved moral concerns over the use of the body. In other words, state intervention and interference in poor women's pregnancies was justified based on moral arguments about the moral fitness and character of adolescent, poor girls.⁷⁹ Class struggles and

74. *Id.* at 27–28.

75. *Id.* at 24–28.

76. *See, e.g.,* ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY*, 126–144 (1974).

77. *See, e.g.,* Julie M. Aultman, *Eugenomics: Eugenics and Ethics in the 21st Century*, 2 *GENOMICS, SOCIETY AND POLICY* 2, 41 (2006).

78. *See generally* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 *CAL. L. REV.* 1239 (2012).

79. This concept is age old and was also prevalent during the earliest American periods, such Antebellum. *See e.g.,* PETER SCHRAG, *IMMIGRATION POLICY COUNCIL, UNWANTED: IMMIGRATION AND NATIVISM IN AMERICA* 3 (2010).

tensions about reproduction, in part, form the basis of Professor Paul Lombardo's enlightening investigations⁸⁰ into the American obsession with moral purity and psychological fitness.⁸¹ Lombardo offers a stunning indictment of the U.S. legal system's complicity in perpetuating constitutional violations against poor, uneducated women and girls.⁸² Indeed, eugenicists of the early twentieth century advanced an ideological platform that successfully manipulated public opinion and spurred public unrest against poor, "socially inadequate" fertile women and girls.⁸³

Poverty, addiction, homelessness, and promiscuousness chiefly represented categories of impurity and "unfitness." Placement into one of these categories could and too frequently did result in criminal incarceration or psychiatric institutionalization in state-run asylums. Carrie Buck, the unsuccessful petitioner in *Buck v. Bell*,⁸⁴ lived in such an institution. States justified incarcerations and the forced sterilizations practiced on these boys, girls, and women as a means of protecting the welfare of its citizens from the degeneracy rampant among the lower classes.

The vestiges of that legacy survive or at least the moral intuitions and foundations remain. For example, *Buck v. Bell*,⁸⁵ the landmark decision affirming a state's right to compel sterilization against a non-consenting woman (or man), has never been overturned. Indeed, *Buck v. Bell* is a horrific case and a chilling example of how the pregnancy penalty may not be remedied even by courts. The case exemplifies failures of law and the Supreme Court to intervene on behalf of vulnerable citizens against the abuse of state power.

In less than ten days (between oral arguments and issuing a written opinion) in *Buck v. Bell*, the U.S. Supreme Court swiftly and decisively dismantled decades of more nuanced jurisprudence on the Fourteenth Amendment,⁸⁶ spurring the rapid expansion of eugenics

80. See generally PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (2008).

81. Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court, From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 2-5 (1996).

82. See *id.* at 1. Lombardo suggests that an evaluation of eugenicists legislative accomplishments and an evaluation of those affected by "eugenical" laws, would demonstrate how extraordinarily successful these people were.

83. See generally Paul A. Lombardo, *Taking Eugenics Seriously: Three Generations of ??? Are Enough?*, 30 FLA. ST. U.L. REV. 191, 205, 216 (2003); see also Lombardo, *supra* note 81.

84. *Buck v. Bell*, 274 U.S. 200, 205-08 (1927).

85. *Buck v. Bell*, 274 U.S. 200 (1927).

86. *Id.* at 200; but see generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

legislation throughout the United States and culminating in tens of thousands of men and women being sterilized.⁸⁷ In a near-unanimous opinion,⁸⁸ Justice Holmes reminded the nation that “the public welfare may call upon the best citizens for their lives.”⁸⁹ So, according to the Justice, it would be unusual, if not “strange if [states] could not call upon those who already sap the strength of [government] for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.”⁹⁰

Holmes articulated an incontrovertibly clear position: class and status matter in reproductive decision-making. He opined that states occupy an important decision-making role in monitoring community health through women’s reproduction.⁹¹ In fact, reproduction becomes legitimately ensconced as a state matter—with the best interests of the state balancing against and trumping individual autonomy.⁹² The Court, however, merely reflected growing sentiment among the public.⁹³ Turn of the century newspaper archives provide a compelling glimpse of a nation comforted by the notion of “breeding out” degeneracy, low IQ, criminality, and poverty through artful, strategic marriages and science.⁹⁴

In 1909, two years after the passage of the first state eugenics legislation, Dr. Eugene Davenport, dean and director of the College of Agriculture at the University of Illinois, presented a paper to an elite

87. *Cumulative Record of Operations for Eugenical Sterilization in the United States from 1907–1935*, ID #952 (1935), THE HARRY H. LAUGHLIN PAPERS, TRUMAN STATE UNIV., <http://www.eugenicsarchive.org/html/eugenics/index2.html?tag=952>.

88. Justice Butler, the lone dissenter, did not issue a written dissent. *Buck v. Bell*, 274 US 200, 208 (1927).

89. *Id.* at 207.

90. *Id.*

91. According to Holmes, “Carrie Buck is a feeble-minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child. . . . Three generations of imbeciles are enough.” *Id.* at 205, 207.

92. *Id.* at 207.

93. See, e.g., Montague Crackenthorpe, *Parents May Improve the Race*, CHI. DAILY TRIB. (1872–1922), July 5, 1908, at G5 (noting that “well established facts show that all who are likely to become parents should take far more care than they do at the present when choosing their partners for life—say, a tenth part of the care they take when selecting their horses or their dogs.”)

94. *Why Not Improve the Human Race?* CHI. DAILY TRIB. (1872–1922), Jan. 26, 1908, at E3; *Bell’s Plan for Uplift of Race*, CHI. DAILY TRIB. (1872–1922), Jan. 30, 1908, at 5.

audience of physicians in Chicago. In the paper, he advocated the application of eugenics, applying theories from his research with cows and livestock to that of people. According to the Chicago Daily Tribune, “his chief proposal was that all the ‘culls’ or ‘scalawags’ of the human race should be taken before the courts, scientifically investigated, and if found unworthy, colonized and allowed to die off.”⁹⁵ Davenport explained that to breed out degeneracy, “let Mr. Jones be taken into court and his ancestry record be investigated. If we find his parents were dominantly bad it means that he is 50 per cent bad...When he gets to 90 per cent bad, it is certain he must be colonized. . . . There is a strict mathematical law that runs through it all.”⁹⁶

Thus, the contemporary policing of women’s reproduction does not represent the only form of monitoring and prosecuting women’s reproductive conduct or gendered public punishment and theatre, because roots of this type of legislative interest and extra-legal force in the reproductive realm trace to eugenic laws in the early twentieth century and the infamous *Buck v. Bell* case.⁹⁷ Doctors at the Virginia Colony, where Buck served her incarceration, were not esteemed among the “inmates.” Their reputations among the incarcerated were characterized by fear and loathing because they sterilized inmates as young as ten years old and delivered babies, but left them to expire in trashcans.⁹⁸ This type of public theatre⁹⁹—then and now not only

95. *Would Eliminate Unfit Humanity*, THE FARMERS VOICE (March 15, 1909), <http://idnc.library.illinois.edu/cgi-bin/illinois?a=d&d=FFV19090315.2.9>.

96. *Id.*

97. *A Perfect Race of Men: According to Prof. Kellar the Success of Eugenics Depends on Rules Made by Custom*, N.Y. TIMES, Sept. 27, 1908 (1857–Current file), <http://query.nytimes.com/mem/archive-free/pdf?res=F20F10FC3C5D16738DDDAE0A94D1405B888CF1D3>. See also *Legislative Status of Eugenic Sterilization in the Several States of the United States, January 1935*, THE HARRY H. LAUGHLIN PAPERS, TRUMAN STATE UNIV., <http://www.eugenicsarchive.org/html/eugenics/index2.html?tag=949>.

98. See THE LYNCHBURG STORY (Worldview Pictures 1993), a documentary that includes interviews with former Lynchburg inmates, an instructor, and tours of the now defunct facility.

99. Michel Foucault’s portrayal of prisons and asylums as places of public theatre for mass consumption and entertainment resonates in the cases of poor women. According to Foucault, the public gains satisfaction and takes pleasure from witnessing punishment of its less desired citizens. MICHEL FOUCAULT, MADNESS AND CIVILIZATION, A HISTORY OF INSANITY IN THE AGE OF REASON viii (1965); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 73 (1975). See also James Allen et al., WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 54–55 (2000), which temporally situates the public theatre of lynching in the

emphasizes the vulnerability of poor women and girls, but also demonstrates disdain and contempt for the reproductive autonomy and equality of women.

Yet, it is not enough to make the case that women's reproduction at times has been subject to the property interest of others, including the state. For example, that alone does not satisfy my inquiry here nor explain why contemporary wars are waged about women and their prenatal conduct. What story can be told to explain why doctors, judges, legislators, and prosecutors police women's reproduction?

Another way to view the trend toward criminal punishment of pregnant women is that it serves to punish vice.¹⁰⁰ James Fitzjames Stephen argues that society must feed its desire to scapegoat others and to generate resentment or even hatred for those who breach moral codes in society. He suggests that there is a fundamental human desire for revenge—even if one is not harmed by the act he seeks to avenge. It is enough that the act was immoral and threatens harm to the moral fabric and values of a society. Hart reflected on Stephen's theory as a crude form of retribution theory.¹⁰¹ Yet, Stephen's view of crime and punishment resonates with the punishment of pregnant women in the U.S. Stephens wrote, criminal punishment can be rationalized because, "the feeling of hatred and the desire of vengeance are important elements in human nature which ought in such cases to be satisfied in a regular public and legal manner."¹⁰²

Stephen's view on hatred and the legitimacy of revenge might offer insights to explain some of the aggressive efforts to punish and publicly humiliate pregnant patients. Indeed, Stephen recognized that the criminal law gives "distinct shape to the feeling of anger" and "distinct satisfaction to the desire for vengeance."¹⁰³ Thus, punishment is not simply about deterrence. Rather, it is the emphatic denunciation by the community and State of the threat posed to fetuses.¹⁰⁴ What distinguishes this passionate form of denunciation is that it has no rehabilitative aspect. It is by its nature

same time frame of eugenics and mass sterilization. In both cases, punishment and sanctioning the poor and *undesirable* facilitate public engagement and theatre. The images reveal parents bringing little children to view lynchings and setting up picnics alongside hanging bodies.

100. See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 99 (Stuart D. Warner, ed., Liberty Fund, Inc. 1993) (1874).

101. HART, *supra* note 60, at 4.

102. STEPHEN, *supra* note 100, at 98.

103. *Id.* at 100.

104. HART, *supra* note 60, at 65.

a moral condemnation that justifies extreme punishment without regard for any context.

V. CONCLUSION

The women most hurt by political maneuvering on abortion access and the criminalization of virtually all conduct during pregnancy, from falling down steps to refusing bed rest, happen to be poor women generally, and too frequently women of color. Wealthier, educated women have reproductive health options and means of defending themselves against cruel turns of the state, unlike their less fortunate counterparts. For wealthy women in states like Mississippi where only one abortion clinic remains, or even Texas, where dozens of clinics have been closed, they cross state lines to avoid the extreme burdens and obstacles imposed by the state. In Michigan, wealthy women can avoid the ban imposed on insurance providers to not cover abortions in that state. Wealth insulates some women from the pain, costs, and humiliation poorer women must endure.

Poor women are symbolically and medically trapped civilly and criminally where extended wait periods, targeted regulations of abortion providers (TRAP laws), and vaginal ultrasounds subject them to ruthless burdens on well-established constitutional rights. On the other hand, their pregnancies are robustly policed for any potential harm, resulting in prosecutions and severe criminal penalties. As this Article explains, these issues take on a new urgency in the wake of robust law making to undermine women's health care rights.